(2)

Supreme Court, U.S.
FILED
MAY 24 2004
OFFICE OF THE CLERK

No. 03-1347

In the Supreme Court of the United States

JACQUELINE ORLOFF, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN A. ROGOVIN
General Counsel
AUSTIN C. SCHLICK
Deputy General Counsel
JOHN E. INGLE
RICHARD K. WELCH
Counsel
Federal Communications Commission
Washington, D.C. 20554

BEST AVAILABLE COPY

QUESTION PRESENTED

Sections 201(b) and 202(a) of the Communications Act of 1934, 47 U.S.C. 201(b) and 202(a), prohibit unjust and unreasonable rates, practices, and discrimination by communications common carriers. The question presented is:

Whether the Federal Communications Commission reasonably determined that a wireless telephone service provider that lacks market power and is not subject to the tariff-filing requirements of 47 U.S.C. 203 may offer customer-specific incentives to potential customers to win their business in a competitive market.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

AT&T Corp. v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999)	2
American Tel. & Tel. Co. v. *Central Office Tel.*, 524 U.S. 214 (1998)	7
Bell Atl. Tel. Co. v. *FCC*, 79 F.3d 1195 (D.C. Cir. 1996)	6
Cellnet Comm., Inc. v. *FCC*, 149 F.3d 429 (6th Cir. 1998)	2
FCC v. *Midwest Video*, 440 U.S. 689 (1979)	5, 8
MCI Telecomm. Corp. v. *American Tel. & Tel. Co.*, 512 U.S. 218 (1994)	2
MCI WorldCom, Inc. v. *FCC*, 209 F.3d 760 (D.C. Cir. 2000)	6, 9
Orloff v. *Vodafone Airtouch Licenses, LLC*, No. 1:00 CV 421 (N.D. Ohio May 30, 2000)	4
Wirless Consumers Alliance, Inc., In re, 15 F.C.C.R. 17,021 (2000)	3
WorldCom, Inc. v. *FCC*, 238 F.3d 449 (D.C. Cir. 2001)	6, 9

Statutes and regulation:

Communications Act of 1934, Tit. II, 47 U.S.C. 201 *et seq.*	1
47 U.S.C. 201	2, 3, 9
47 U.S.C. 201(b)	2, 4, 8
47 U.S.C. 202	2, 5, 9

Statutes and regulation—Continued: Page

47 U.S.C. 202(a) 2, 4, 5, 8
47 U.S.C. 203 ..... 2, 3, 5, 7
47 U.S.C. 332 2
47 U.S.C. 332(c)(1) 5
47 U.S.C. 332(c)(1)(A) 3
47 U.S.C. 332(d)(1) 2, 5
Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Tit. VI, 107 Stat. 392 2
§ 6002(b)(2)(A), 107 Stat. 392 2
§ 6002(b)(2)(B), 107 Stat. 392 2
47 C.F.R. 20.15(c) 7

Miscellaneous:

Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, In re, 9 F.C.C.R. 1411 (1994) 3

In the Supreme Court of the United States

No. 03-1347

JACQUELINE ORLOFF, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 352 F.3d 415. The opinion and order of the Federal Communications Commission (Pet. App. 11a-36a) is reported at 17 F.C.C.R. 8987.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2003. The petition for a writ of certiorari was filed on March 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Communications Act of 1934, 47 U.S.C. 201 *et seq.*, imposes on communications common carriers certain duties designed to protect consumers from abuses of market power. Carrier rates and prac-

tices must be just and reasonable, 47 U.S.C. 201(b), and free of unjust and unreasonable discrimination, 47 U.S.C. 202(a). The historical "centerpiece" of Title II's regulatory scheme is 47 U.S.C. 203, which requires common carriers to file tariffs with the Federal Communications Commission setting forth their rates and to charge only the filed rate. *MCI Telecomm. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994). The Section 203 tariff-filing requirement was "Congress's chosen means" of preventing unjust and unreasonable rates and discrimination by carriers with market power. *Id.* at 230.

Over time, technological and market advances have allowed competition in communications services. See, *e.g.*, *MCI*, 512 U.S. at 220 (long distance service); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (local telephone service). Congress responded by, *inter alia*, authorizing the Commission to exempt certain carriers from Section 203's tariff-filing requirement. In particular, Congress amended Section 332 of the Communications Act of 1934, 47 U.S.C. 332, in 1993 "to dramatically revise the regulation of the wireless telecommunications industry, of which cellular telephone service is a part." *Cellnet Comm., Inc.* v. *FCC*, 149 F.3d 429, 433 (6th Cir. 1998). See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Tit. VI, § 6002(b)(2)(A) and (B), 107 Stat. 392. Congress referred to cellular services as commercial mobile radio services (CMRS). See 47 U.S.C. 332(d)(1). Although CMRS providers are "common carriers" generally subject to Title II, Congress authorized the Commission to forbear from applying certain common-carrier requirements—not including the requirements of Sections 201 and 202—if it determined that forbearance is consistent with ensuring just and reasonable charges and practices, pro-

tecting consumers, and the public interest. See 47 U.S.C. 332(c)(1)(A).

In 1994 the Commission implemented the recent congressional amendment by, among other things, exempting CMRS providers from the tariff-filing requirement of Section 203, thereby allowing those providers to specify their rates, terms, and conditions of service in private contracts with customers, rather than in published tariffs. The Commission explained that "market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power." *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 1411, para. 173, at 1478 (1994). See *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, paras. 20-21, at 17,032-17,033 (2000) (competitive marketplace protects consumers from unjust and unreasonable discrimination and rates).

2. At all times relevant to this case, multiple CMRS providers in the Cleveland, Ohio, area market offered consumers a variety of service features, plans, and prices. The providers competed vigorously for consumers' business through advertising, marketing, and promotions. Pet. App. 2a; see *id.* at 12a-13a.

In that highly competitive market, petitioner elected to buy cellular telephone service from Verizon Wireless under an advertised service plan, but she also negotiated several "sales concessions" from Verizon Wireless that departed from the plan's standard terms and conditions. Those concessions included a reduced price on a new cellular telephone, waiver of the standard activation charge, a lower monthly access fee for six months, and free weekend calling for three months. Five months into her two-year contract, Verizon Wire-

less permitted petitioner to switch to a different advertised plan and afforded her new benefits and additional concessions. Pet. App. 3a; see *id.* at 14a-15a.

Upon learning that other Verizon Wireless customers in the Cleveland area had negotiated certain sales concessions that she did not receive, petitioner sued Verizon Wireless in federal district court. Her putative class action sought damages on behalf of at least 50,000 Verizon Wireless customers in Ohio. Petitioner claimed in her suit that the carrier's practice of granting individualized sales concessions violated the prohibition of Section 202(a) against unreasonable discrimination. Invoking the doctrine of primary jurisdiction, the district court referred the matter to the Commission. *Orloff* v. *Vodafone Airtouch Licenses, LLC*, Case No. 1:00 CV 421 (N.D. Ohio May 30, 2000). See Pet. App. 3a; see *id.* at 15a.

3. The Commission determined that Verizon Wireless's practice of negotiating concessions with individual customers in the Cleveland CMRS market was not unjust and unreasonable under Section 201(b) or unreasonably discriminatory under Section 202(a). Pet. App. 12a, 16a-22a. Market forces, the Commission concluded, were sufficient to protect Cleveland area consumers from unjust and unreasonable discrimination and charges. Customers could "shop around" for the carrier and plan that best suited their needs, dissatisfied customers could switch carriers, and there was no evidence of market failure limiting customers' options. *Id.* at 19a, 21a. The Commission found no evidence in the record that Verizon Wireless had declined to serve any particular demographic group or geographic area or refused to engage in negotiations initiated by any customer. *Id.* at 19a-20a.

4. The court of appeals denied petitioner's ensuing petition for review of the Commission's order. Pet. App. 1a-10a. The court of appeals observed that, "[i]n the past, the question whether a common carrier engaged in 'unjust or unreasonable discrimination' in violation of § 202 was largely determined by reference to the carrier's tariff." *Id.* at 6a. But the court further noted that the Commission, pursuant to Congress's authorization in Section 332(c)(1), had exempted CMRS providers from the Section 203 tariff-filing requirement. That fundamental regulatory shift, the court of appeals explained, means that obligations arising from a common carrier's filing of public tariffs do not apply to CMRS providers. The traditional link between a common carrier's non-discrimination obligations and its tariff-compliance obligations has been severed in the context of CMRS. *Id.* at 4a-6a.

Particularly because the current regulatory regime for CMRS "bears so little resemblance" to the traditional tariff-based regime for regulation of common carriers, the court of appeals determined that the legality of Verizon Wireless's sales concession practice is not determined merely by the company's status as a common carrier, but rather depends on the company's specific obligations under Sections 201 and 202 of the Communications Act. Pet. App. 8a. Accordingly, the court rejected petitioner's contention that, as a common carrier, Verizon Wireless necessarily is precluded from "mak[ing] individualized decisions, in particular cases, whether and on what terms to deal." *Id.* at 6a (quoting *FCC* v. *Midwest Video*, 440 U.S. 689, 701 (1979)). Sections 201(b) and 202(a), the court noted, prohibit only unjust and unreasonable discrimination in charges and services. *Id.* at 8a. The court concluded that the generality of the terms Congress used—"just" and

"reasonable"—"open[] a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." *Ibid.* (emphasis omitted) (quoting *Bell Atl. Tel. Co.* v. *FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)).

In judging whether Verizon Wireless's sales concession practice in the Cleveland area was reasonable, the court of appeals concluded that, where neither Verizon Wireless nor any other CMRS provider was dominant, the "Commission was 'entitled to rely on the value of the free market, the benefits of which are well-established.'" Pet. App. 9a-10a (quoting *MCI WorldCom, Inc.* v. *FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)). The court observed that negotiation between buyers and sellers (i.e., "haggling") is "a normal feature of many competitive markets" that allows "consumers to get the full benefit of competition by playing competitors against each other." *Id.* at 10a. The court noted that consumers who were dissatisfied with Verizon Wireless were able to do business with another CMRS provider, *id.* at 9a, and therefore they could "play[] competitors against each other" and would "only benefit" from Verizon Wireless's willingness to bargain, *id.* at 10a. The court of appeals thus upheld the Commission's determination that Verizon Wireless's sales concession practice was reasonable and not unreasonably discriminatory. *Ibid.* By contrast, the court said, petitioner's proposed prohibition on bargaining would deny consumers the benefits of negotiation and contradict "Congress' clearly articulated policy in favor of competition in telecommunications services." *Ibid.* (citing *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 454 (D.C. Cir. 2001)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

1. Petitioner's claim of a conflict with cases describing the common law obligations of common carriers (see Pet. 9-11) is unfounded, because Verizon Wireless's operations in the Cleveland area are exempt from the tariff obligation to which common carriers historically have been subject.

Under the filed rate doctrine and 47 U.S.C. 203, "the rate a carrier duly files" with the Commission "is the only lawful charge" the carrier may impose for the covered service. *American Tel. & Tel. Co.* v. *Central Office Tel.*, 524 U.S. 214, 215 (1998). CMRS providers like Verizon Wireless in Cleveland, however, are not required to file tariffs and, indeed, are forbidden to do so. 47 C.F.R. 20.15(c). Rules against individualized negotiation that were developed under the filed rate doctrine have no application in this case, because there is no "filed rate" to which the carrier is bound.

As the court of appeals explained (Pet. App. 6a-9a), the Commission's congressionally authorized forbearance from applying Section 203 to CMRS providers takes this case out of the line of cases, on which petitioner relies, that involve dominant carriers whose rates are regulated through statutory tariff-filing requirements. Although there is a substantial body of law applying the filed rate doctrine to tariffed common carrier services, that law does not address the charges negotiated by non-dominant common carriers in competitive markets without tariffs. Petitioner has not identified any case that presents issues and circumstances similar to the ones here, much less a developed

conflict among the circuits that would warrant review by this Court.

In particular, contrary to petitioner's contention (Pet. 9), the decision below does not conflict with this Court's statement in *FCC* v. *Midwest Video*, 440 U.S. 689, 701 (1979), that communications common carriers do not "make individualized decisions in particular cases, whether and on what terms to deal" with consumers. That statement was an accurate description of the role of common carriers under a traditional system involving the filing of tariffed rates and a statutory obligation to comply with those rates. As the court of appeals recognized (Pet. App. 6a-7a), however, that statement was not an accurate description of the obligations of CMRS providers now that the Commission, acting under authority delegated by Congress, has eliminated the requirement that they file tariffs. Now that "there is no statutory provision even requiring that the carrier publicly disclose any of its rates" and now that carriers may change rates "without Commission approval and without waiting even for a moment," *id.* at 7a, the nature of the common carrier obligations to avoid rates that are not just and reasonable under 47 U.S.C. 201(b) and "unjust and unreasonable" discrimination under 47 U.S.C. 202(a) is different. *Midwest Video* did not consider or address the nature of common carrier obligations under the new regulatory regime.

2. The Commission, upheld by the court of appeals, reasonably applied 47 U.S.C. 201(b) and 202(a) in the context of Verizon Wireless's service offerings in the competitive Cleveland CMRS market. The court of appeals correctly recognized (Pet. App. 8a) that the "just and reasonable" requirements of Sections 201(b) and 202(a) incorporate a congressional grant of broad discretion to the Commission.

In the context of a CMRS market characterized by robust competition without any dominant service provider, the agency permissibly took into account the opportunities and protections afforded to consumers by the free market, "the benefits of which are * * * established." Pet. App. 9a-10a (quoting *MCI WorldCom, Inc.* v. *FCC*, 209 F.3d 760, 766 (D.C. Cir. 2000)); see *id.* at 17a-20a. The Commission's reliance on competitive forces in enforcing Sections 201 and 202 furthered the "clearly articulated" congressional policy favoring competition in communications markets. *Id.* at 10a (citing *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 454 (D.C. Cir. 2001)). By contrast, as the court of appeals also observed, denying Verizon Wireless the opportunity to negotiate with individual customers would "harm consumers." *Ibid.* In fact, petitioner herself benefited on two separate occasions from individual negotiation with Verizon Wireless. *Ibid.*

The Commission and the court of appeals both emphasized in this case that Sections 201 and 202 continue to protect consumers when competitive forces are inadequate to prevent unjust or unreasonable practices by CMRS providers. For instance, Section 202 might be violated if a CMRS provider discriminated against rural or other customers who do not have a choice of service providers, or drew distinctions based on consumers' race or income. See Pet. App. 7a-8a, 19a-20a, 34a n.69. It is undisputed, however, that such concerns are not present in this case. *Id.* at 8a, 20a.

3. Finally, petitioner suggests (Pet. 15) that "the logical extension of the D.C. Circuit's decision" could "create uncertainty" in other industries such as trucking, airlines, and railroads. That argument also is mistaken. The court of appeals was clear that it addressed only "the Commission's determination that Verizon's

granting of sales concessions was a reasonable response to competitive conditions in the Cleveland market," Pet. App. 2a, under the particular statutory provisions that apply to CMRS providers, see *id.* at 4a-10a. Indeed, the FCC specifically stated (*id.* at 20a) that its determinations concerning the reasonableness of Verizon Wireless's customer-specific arrangements in Cleveland "do[] not necessarily translate" to other communications markets marked by less competition or presenting different circumstances, much less to other industries.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN ROGOVIN
General Counsel
AUSTIN C. SCHLICK
Deputy General Counsel
JOHN E. INGLE
RICHARD K. WELCH
Counsel
Federal Communications Commission

MAY 2004